Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271
	)	

COMMENTS OF AT&T INC.

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I. INTRODUCTION AND SUMMARY

AT&T Inc. and its affiliates (collectively, AT&T) respectfully submit the following comments in response to the above-captioned notice of proposed rulemaking regarding consumer protection in the broadband era.[1]

As the Commission considers whether consumer protection regulations are necessary for broadband Internet access services, we encourage the Commission to keep in mind that Congress intended for the Commission to rely on market forces, rather than regulation, to promote broadband deployment. In light of this Congressional preference for market forces, consumer broadband regulations should be imposed only where the Commission has identified a clear and present market failure that necessitates Commission action. While there is generally no evidence of such a market failure at this time, the Commission should nevertheless monitor all aspects of the broadband marketplace and, if the need arises, swiftly take corrective action to the extent it identifies a market failure in the future.

Regarding the specific, substantive consumer protection issues raised in the *Consumer Broadband Notice*, there is generally no need for the Commission to extend its legacy, voice-centric consumer protection regulations to broadband Internet access service. Indeed, in today's highly competitive marketplace for broadband Internet access service, providers have strong incentives to attract and retain customers by adopting pro-consumer policies and practices. Thus, the historic concerns that gave rise to Commission regulations for slamming, truth-in-billing, the use of customer proprietary network information, geographic rate averaging and rate

[1] *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Notice of Proposed Rulemaking, FCC 05-150 (released Sept. 23, 2005) (*Consumer Broadband Notice*). On November 18, 2005, SBC Communications Inc. closed on its merger with AT&T Corp. The resulting company is now known as AT&T Inc. Thus, in these comments "AT&T" refers to the merged company, including its ILEC operating subsidiaries, unless otherwise noted.

integration, and network outage reporting are either not present in today's broadband market or are being adequately addressed through voluntary industry initiatives and/or by the Federal Trade Commission and state attorneys general under non-communications-specific consumer protection laws.

However, because these same competitive incentives may not exist when broadband Internet access providers seek to discontinue service and exit the marketplace, market forces alone may not be sufficient to fully protect consumers from potential disruptions in service. Thus, the Commission may want to consider using its Title I authority to establish a *streamlined* discontinuance procedure for providers of broadband Internet access service, similar to the procedure it has in place for non-dominant telecommunications carriers. If crafted appropriately, such a measure could ensure that consumers are given a reasonable opportunity to transition to a new service provider, without unduly burdening the discontinuing provider.

Finally, AT&T believes that state commissions can continue to play an important role in protecting consumers from potential harm. Because broadband Internet access services are inherently interstate, however, any role for state commissions in consumer protection matters must be consistent with the overarching *federal* regulatory framework that governs these services.

II. DISCUSSION

A. Principles to Guide the Commission's *Consumer Broadband* Proceeding.

The stated purpose of the Commission's *Consumer Broadband Notice* is to "develop a framework for consumer protection in the broadband age . . . that ensures that consumer protection needs are met by *all* providers of broadband Internet access service, regardless of the

underlying technology."[2] To construct this framework, the Commission asks whether, as a general matter, it should impose regulations pursuant to its ancillary jurisdiction under Title I or, instead, whether it should rely primarily on market forces to accomplish some or all of the specific consumer protection goals identified in the *Notice*.[3] As the Commission evaluates how best to achieve these goals, AT&T urges the Commission to keep in mind the following points.

1. Congress Intended for the Commission to Rely on Market Forces, Rather than Regulation, to Promote Broadband Deployment.

One of Congress's primary objectives in enacting the 1996 Act was for the Commission to promote the deployment of advanced broadband services by relying on the competitive forces of the marketplace rather than predictive, investment-draining regulation. Indeed, the purpose of the 1996 Act is to "provide for a *pro-competitive, de-regulatory* national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans . . . ."[4] This market-oriented, pro-investment philosophy is further reflected in section 706 of the Act, where Congress mandated that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" through a variety of tools, including forbearance, "that remove barriers to infrastructure investment."[5] But if there was any doubt about Congress's preference for market forces, section 230 of the Act is unmistakably clear on this point: "It is the policy of the United States . . . to preserve the vibrant and competitive free

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[2] *Consumer Broadband Notice* ¶ 146 (emphasis in original).

[3] *Consumer Broadband Notice* ¶ 147.

[4] *See* Joint Explanatory Statement of the Committee of the Conference, S. Rep. No. 230, 104th Congress, 2d Sess. 1, 113 (1996) (emphasis added).

[5] Section 706(a) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157.

market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulations*."[6] Thus, as the Commission moves forward with the *Consumer Broadband* proceeding, the Commission should not lose sight of the fact that Congress has determined that market forces, not regulation, will bring the greatest benefits to our nation's broadband consumers.

2. Consumer Broadband Regulations Should Be Imposed Only Where There Is a Clear and Present Market Failure that Necessitates Commission Action.

Given the Congressional preference for marketplace forces over regulation, the Commission should resort to imposing consumer protection regulations on broadband services only after it has identified a clear and present market failure that requires action by this Commission. To date, however, no such consumer-related market failures have arisen. Quite to the contrary, the Commission has repeatedly determined that the market for broadband Internet access services is competitive and that consumers are deriving substantial benefits from the broadband services available today.

For example, in the *Fourth 706 Broadband Report*, the Commission found that broadband services were being deployed to all Americans in a "reasonable and timely fashion" by a diverse collection of broadband providers, including cable companies, telephone companies, fixed wireless providers, mobile wireless providers, satellite providers and powerline companies.[7] The Commission observed that the existence of multiple broadband providers and platforms will drive a virtuous cycle by "promot[ing] competition in price, features, and quality-

[6] 47 U.S.C. § 230(b)(2) (emphasis added). *See also* 47 U.S.C. § 7(a) ("It shall be the policy of the United State to encourage the provision of new technologies and services to the public.").

[7] *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208 at 14-23, 38-39 (released March 17, 2004) (*Fourth 706 Broadband Report*).

of-service," which, in turn, will have a "symbiotic, positive effect on the overall adoption of broadband."[8] The Commission further explained that "as consumers discover new uses for broadband access at affordable prices, subscribership will grow; and as subscribership grows, competition will constrain prices and incent the further deployment of new and next-generation networks and ever-more innovative services."[9] To ensure this cycle continues, the Commission found that only "minimal regulation" should be applied to broadband services.[10]

In light of the competition already present in the broadband marketplace, the Commission should not impose new regulations on broadband services and providers unless it first identifies a specific failure that actually exists in the marketplace to the detriment of consumers today. Speculation about consumer harms that *may* happen in the future or *could* occur at some later date is simply not a sufficient justification for imposing onerous regulations on a competitive market to address harms that may never occur.[11] Moreover, the imposition of unnecessary and burdensome regulation would likely distort, rather than foster, additional competition. As

[8] *Fourth 706 Broadband Report* at 9. *See also Consumer Broadband Notice* ¶ 61 ("As any provider increases its market share or upgrades its broadband Internet access service, other providers are likely to mount competitive challenges, which likely will lead to wider deployment of broadband Internet access service, more choices, and better terms.") (footnote omitted); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 01-338, Memorandum Opinion and Order, FCC 04-254 ¶29 (released Oct. 27, 2004) ("[B]roadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs.").

[9] *Fourth 706 Broadband Report* at 9.

[10] *Fourth 706 Broadband Report* at 9.

[11] *See The FCC and the Unregulation of the Internet*, Jason Oxman, FCC Office of Plans and Policy Working Paper No. 31 at 25 (July 1999) ("The Commission should, of course, avoid regulation based solely on speculation of a potential future problem."); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, CS Docket No. 99-251, Memorandum Opinion and Order, FCC 00-202 ¶ 128 (released June 6, 2000) (*AT&T/MediaOne Order*) (expressing concern about AT&T potentially leveraging its control of Excite@Home to disadvantage alternative broadband providers; but declining to impose a broadband "open access" requirement on AT&T, and instead deciding to "aggressively monitor broadband developments" and to take corrective action if market failures occurred); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 ¶ 21 (released March 15, 2002) (observing that Excite@Home filed for bankruptcy in February 2002).

Chairman Martin succinctly stated, "the Commission shouldn't be adopting regulations in anticipation of problems that we haven't seen materialize . . . ."[12] Thus, as the Commission moves forward with the *Consumer Broadband Notice*, AT&T urges the Commission not to impose any new consumer-oriented regulations on the competitive market for broadband Internet access service, with one potential exception discussed below in section II.B.7

3. The Commission Should Continue to Monitor the Broadband Marketplace.

While there is generally no need to impose new regulations on the competitive broadband marketplace today, the Commission should continue to monitor the marketplace so that it will be in a position to adopt regulations in the future if the need arises. For example, the Commission regularly assesses the status of the broadband market as part of its duty to promote broadband deployment under section 706 of the 1996 Act.[13] To date, the Commission has completed four such inquiries under section 706, through which the Commission has collected a tremendous amount of information about the broadband market from a wide range of commenters, including service providers, consumer advocates, state and local regulators, and other stakeholders. In addition to conducting these section 706 inquiries, the Commission adopted a broadband data collection program to enhance the Commission's "ability to develop, evaluate, and revise policy" regarding broadband services.[14] The Commission also has sought comment on consumer protection issues related to IP-enabled services in the *IP-Enabled Services Notice*.[15] The

[12] *At FCC, Broadband Access is Chief Issue*, LA Times (Dec. 19, 2005).

[13] *See* Section 706(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157.

[14] *See Local Competition and Broadband Reporting*, WC Docket No. 04-141, Report and Order, FCC 04-266 ¶ 6 (released Nov. 12, 2004).

[15] *See IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 ¶¶ 71-72 (released March 10, 2004).

Commission should use these and other relevant proceedings to continue monitoring all levels of the broadband marketplace for signs of market failures that negatively affect consumers.

In monitoring the broadband marketplace, however, the Commission should not focus its attention solely on facilities-based providers of Internet access services. Rather, the Commission should keep a watchful eye on *all* providers of broadband-based services and applications that impact consumers' Internet access experiences. To the extent the Commission finds a market failure, it should act swiftly and decisively to remedy the problem, either on its own or by referring the matter to the Federal Trade Commission if the problem would be more appropriately addressed through that agency's jurisdiction. In addition, to the extent increased regulatory oversight is warranted, any consumer protection regulations that are ultimately adopted should be crafted in a competitively neutral manner and should apply evenhandedly to *all* providers of broadband-based services and applications. By exercising this oversight of the broadband marketplace, the Commission can, as a general matter, maintain the "hands-off" policy towards broadband services that Congress intended, while still giving itself the ability to step-in to take corrective action if consumer concerns arise in the future.

B. Specific Consumer Protection Issues.

1. Slamming

Section 258 of the Act prohibits telecommunications carriers from making unauthorized changes in a subscriber's selection of a provider of local or toll telephone service – a practice commonly known as "slamming."[16] In the *Consumer Broadband Notice*, the Commission asks whether it should exercise its Title I authority to adopt rules prohibiting slamming by providers

[16] 47 U.S.C. § 258(a).

of broadband Internet access service.[17] In seeking comment on this issue, however, the Commission does not suggest that slamming has actually ever occurred in the context of broadband Internet access service, let alone at a rate that would warrant Commission intervention. In fact, the Commission acknowledges that slamming may not even be technically feasible with broadband Internet access service.[18]

Indeed, in order to select a provider of broadband Internet access service, a subscriber must typically obtain some type of customer premises equipment (CPE) from the service provider, such as a cable or DSL modem, that is usually configured to work only with the specific service provider chosen by the subscriber. Thus, a competing broadband service provider seeking to "slam" the subscriber would need to physically reconfigure the CPE from the original provider or enter the subscriber's premises and substitute its own CPE for the original provider's CPE – and do so without the subscriber's knowledge. To put it mildly, the likelihood of this slamming scenario occurring in practice seems rather remote. Accordingly, absent evidence of such broadband slamming, the Commission should not expend its limited resources to create a solution for a problem that has not been shown to exist.

2. Truth-in-Billing

The Commission's Truth-in-Billing (TIB) rules are designed to protect consumers from "misleading and inaccurate billing practices."[19] The rules impose certain requirements on the manner in which these carriers structure their bills and the terms carriers use to describe the

[17] *Consumer Broadband Notice* ¶¶ 150-51.

[18] *Consumer Broadband Notice* ¶ 151 n.453.

[19] *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72, ¶ 7 (released May 11, 1999) (*First TIB Order*).

charges on those bills.[20] Today, the TIB rules apply only to "telecommunications common carriers."[21] In the *Consumer Broadband Notice*, the Commission asks whether it should use its Title I authority to extend the TIB rules to providers of broadband Internet access service. Such an extension, however, is both unnecessary and duplicative.

The Commission adopted the TIB rules because the practices of "common carriers" were expressly *excluded* from generally applicable consumer protection laws administered by the Federal Trade Commission (FTC).[22] Indeed, during the rulemaking that led to the TIB rules, the FTC candidly acknowledged that it "does not have jurisdiction over common carrier activities regulated by the FCC under Title II of the Communications act of 1934 . . . ."[23] Thus, the FCC adopted the TIB rules for common carriers to fill a gap in the FTC's statutory authority to regulate "unfair or deceptive acts or practices in or affecting commerce."[24]

But no such gap exists with respect to broadband Internet access services, which are information services, not common carrier services.[25] As such, providers of broadband Internet access service *would* be subject to the FTC's jurisdiction and, if necessary, the FTC can bring its considerable consumer protection expertise to bear on any broadband billing issues that require attention. Moreover, according to the National Association of Attorneys General:[26]

> Every state has a consumer protection statute prohibiting deceptive acts and practices. . . . The State Attorneys General have varied tools and

[20] *See* 47 C.F.R. § 64.2401.

[21] *See* 47 C.F.R. § 64.2400.

[22] *First TIB Order* ¶ 27 n.62 (quoting 15 U.S.C. § 45(a)(2)).

[23] FTC Comments, CC Docket No. 98-170, at 7 n.10 (Nov. 13, 1998).

[24] *See* 15 U.S.C. § 45(a)(2).

[25] *Consumer Broadband Notice* ¶ 5.

[26] *See* NAAG Projects: Consumer Protection, at http://www.naag.org/issues/issue-consumer.php.

> authority to address abuses and illegalities in the market place. These include civil and criminal litigation, mediation, public and business education, creating and commenting on state and federal legislative proposals, and cooperative enforcement ventures with state, local, and federal enforcement agencies.

Thus, in addition to the FTC, state attorneys general provide another check on the billing practices of broadband Internet access providers.[27] Accordingly, there is no need for this Commission to duplicate the efforts of the FTC and the state attorneys general by layering predictive TIB rules on top of existing federal and state consumer protection laws.

3. Customer Proprietary Network Information

Under section 222 of the Act, "telecommunications carriers" have a duty to use customer proprietary network information (CPNI) only in connection with providing telecommunications services to their subscribers.[28] To the extent a carrier wants to use CPNI for other purposes (e.g., to enable the carrier or a third party to market new services to the subscriber), the carrier must first obtain approval from its subscribers.[29] Because section 222 is limited to telecommunications carriers, the CPNI restrictions do not apply to providers of broadband Internet access service or other information services. In light of this limitation, the Commission asks whether it should use its Title I authority to establish CPNI-like rules for providers of broadband Internet access service.[30]

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[27] *See* Texas Attorney General Comments, WC Docket No. 04-36, at 16-17 (May 28, 2004); New York Attorney General Comments, WC Docket No. 04-36, at 13 (May 28, 2004).

[28] *See* 47 U.S.C. § 222. CPNI is defined as "(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." *Id.* § 222(h)(1)(A), (B).

[29] *See* 47 U.S.C. § 222(c)(2).

[30] *Consumer Broadband Notice* ¶ 149.

As the Commission acknowledges, however, "customer information derived from the provision of enhanced services was *not* subject to CPNI protections" under the pre-1996 Act CPNI framework.[31] Thus, when Congress was drafting the 1996 Act, it was well aware of the Commission's prior decision not to apply CPNI restrictions to enhanced services. Armed with this knowledge, Congress could have extended the CPNI restrictions in the 1996 Act to information obtained from the provision of enhanced services. But Congress chose not to do so. Instead, Congress designed the 1996 Act to be a "pro-competitive, *de-regulatory* national policy framework" and decided to leave enhanced services essentially unregulated.[32] Given this Congressional preference for unregulation, the Commission should only consider imposing CPNI-like restrictions on enhanced services if it can clearly identify a privacy problem that necessitates action by *this* Commission.

In today's broadband marketplace, however, such a problem has not been shown to exist. Because of the intense competition in the marketplace and because of their direct relationship with the broadband subscriber, broadband providers already have strong incentives to meet consumer demand for privacy protections. If they fail to meet that demand, consumers can "vote with their feet" in the competitive marketplace by choosing a different broadband provider with a more stringent privacy policy. Indeed, many broadband providers voluntarily post their privacy policies on their websites for review by current and prospective customers.[33] In fact, in response

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[31] *Consumer Broadband Notice* ¶ 149 n.447 (emphasis added).

[32] Joint Explanatory Statement of the Committee of the Conference, S. Rep. No. 230, 104th Congress, 2d Sess. 1, 113 (1996). *See also The FCC and the Unregulation of the Internet*, Jason Oxman, FCC Office of Plans and Policy Working Paper No. 31 at 24 (July 1999) ("Perhaps the most important contribution to the success of the Internet that the FCC has made has been its consistent treatment of IP-based services as unregulated information services.").

[33] *See, e.g.*, AT&T Online Privacy Policy, at http://www.att.com/privacy/; Verizon Online's Privacy Policy, at http://business.verizon.net/policies/privacy.asp; BellSouth Online Privacy Policy, at http://www.bellsouth.com/privacydoc.html; Comcast High-Speed Internet Privacy Statement, at http://www.comcast.net/privacy/; Time Warner Broadband National Privacy Notice, at

to consumer demand, a sizeable number of Internet-based service providers participate in industry-wide organizations, such as the Better Business Bureau's BBBOnline Privacy program and the TRUSTe privacy partnership, which develop, implement, and police online privacy policies.[34] Among other things, these organizations have developed privacy programs that enable participating providers to display the organization's seal-of-approval if they adhere to certain privacy standards and practices, such as creating strict privacy policies, posting these policies online, agreeing to have their compliance with the policies monitored, and participating in consumer dispute resolution programs. In light of these successful industry-led efforts, there is no need for the Commission to burden broadband Internet access service providers with legacy CPNI-like regulations.

Moreover, even if there were a pressing need for regulatory intervention in the broadband marketplace to protect consumer privacy interests, the Federal Trade Commission may be the more appropriate entity for that task. The FTC has both the authority and the resources to address consumer privacy issues. Indeed, privacy is "a central element of the FTC's consumer protection mission."[35] Under the Federal Trade Commission Act, the FTC is empowered to prevent "unfair or deceptive acts or practices in or affecting commerce,"[36] which the FTC has relied upon to police the privacy practices of various companies. According to the FTC, "[a] key part of [its] privacy program is making sure companies keep the promises they make to consumers about privacy and, in particular, the precautions they take to secure consumers'

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http://www.timewarnerspecial.com/privacy.html; Earthlink Privacy Policy, at http://www.earthlink.net/about/policies/privacy/.

[34] *See* Better Business Bureau Online, at http://www.bbbonline.org/; TRUSTe at http://www.truste.org/. The pre-merger AT&T Corp. was a member of BBBOnline and the pre-merger SBC was a member of TRUSTe.

[35] FTC Privacy Initiatives, at http://www.ftc.gov/privacy/.

[36] 15 U.S.C. § 45(a).

personal information. . . . The [FTC] has also used its unfairness authority to challenge information practices that cause substantial consumer injury."[37] In addition, many state attorneys general have asserted similar authority to address privacy concerns by preventing unfair or deceptive practices under state consumer protection laws of general applicability.[38] Thus, in light of the ongoing efforts by the FTC and the state attorneys general, there is simply no need for this Commission to create new CPNI-like rules for broadband Internet access service.

Nonetheless, if this Commission were to conclude that CPNI-like rules are necessary, the Commission must ensure that such rules apply on a competitively neutral basis to all providers of broadband services and applications. Applying such rules only to facilities-based broadband Internet access service providers is an incomplete solution that would do little to protect consumers, but would significantly distort the broadband marketplace by giving other non-facilities-based providers a substantial competitive advantage. Indeed, there are a wide variety of non-facilities-based providers in the broadband market that handle potentially sensitive information about the types of broadband services that consumers use and the manner in which they use them. For example, providers that offer online search engines, VoIP services, or Internet music or video applications may acquire extensive information about consumers' online behavior (e.g., the websites they visit, the parties with whom they communicate, and the content they consume). Aside from being sensitive, this information can be quite valuable, not only to the provider seeking to market new services to its own consumers, but also to unaffiliated third

[37] Enforcing Privacy Promises: Section 5 of the FTC Act, Federal Trade Commission, at http://www.ftc.gov/privacy/privacyinitiatives/promises.html. *See* Internet Service Provider Settles FTC Privacy Charges, FTC Press Release (March 10, 2005).

[38] *See* NAAG Projects: Consumer Protection, at http://www.naag.org/issues/issue-consumer.php ("The consumer protection work of State Attorneys General over the past year has run the gamut from telemarketing to telecommunications and from prescription drugs and privacy to price-gouging."); State Settles Online Privacy Case, New York Attorney General Press Release (Jan. 14, 2003).

parties in search of similar marketing opportunities. Thus, to the extent the Commission ultimately finds that CPNI-like regulations are needed to protect consumers, it must take great care to ensure that such regulations are applied to *all* providers of broadband services and applications in a competitively neutral fashion.

4. Section 254(g) Rate Averaging and Rate Integration

Section 254(g) of the Communications Act, and the Commission's rules implementing that section, contain two provisions regulating the rates that interexchange carriers charge for their services. The first provision, known as "rate averaging," mandates that the "rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas."[39] The second provision, known as "rate integration," specifies that "a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other state."[40]

Although section 254(g) is expressly limited to "interexchange telecommunications services," the Commission nonetheless asks whether it should exercise its Title I authority to impose similar requirements on providers of broadband Internet access services.[41] As discussed below, however, imposing rate averaging or rate integration requirements on providers of broadband Internet access service would be antithetical to the "hands-off" approach Congress and this Commission have traditionally taken for Internet-based services. Moreover, even if the

[39] 47 U.S.C. § 254(g). *See also* 47 C.F.R. § 64.1801(a).

[40] 47 U.S.C. § 254(g). *See also* 47 C.F.R. § 64.1801(b).

[41] *Consumer Broadband Notice* ¶ 157.

Commission wanted to establish 254(g)-like regulations for broadband Internet access service, doing so would most likely be beyond the Commission's Title I authority.

The fundamental purpose of rate averaging and rate integration requirements, as their names suggest, is to regulate the rates of the services in question. Such rate regulation, however, would be in direct conflict this Commission's well-established policy of eschewing *any* economic regulation for Internet-based services. Indeed, the Commission recently preempted the Minnesota Public Utilities Commission from subjecting Vonage's Voice over Internet Protocol (VoIP) service to the *same type of rate averaging and rate integration requirements at issue here*.[42] As the Commission stated in the *Vonage Order*, the Commission has a "long-standing national policy of nonregulation of information services, particularly regarding economic regulation such as the type imposed on Vonage . . . . [E]conomic regulation of information services would disserve the public interest because these services lacked the monopoly characteristics that led to such regulation of common carrier services historically."[43] In light of this long-standing policy of unregulation and the Commission's recent preemption of state rate averaging and rate integration requirements for Vonage's VoIP service, there is simply no

[42] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 ¶ 11 n.30 (released Nov. 12, 2004) (*Vonage Order*) ('because . . . we specifically preempt Minnesota's certification requirements for Digital Voice in this Order, regulations applicable to certificated entities would not be applicable to Vonage for Digital Voice."); Minn. Stat. § 237.74(2) ("The rates of a telecommunications carrier must be the same in all geographic locations of the state unless for good cause the commission approves different rates. A company that offers long-distance services shall charge uniform rates and charges on all long-distance routes and in all geographic areas in the state where it offers the services.").

[43] *Vonage Order* ¶ 21. *See also Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 at ¶ 1 (released Feb. 19, 2004) ("We formalize the Commission's policy of nonregulation to ensure that Internet applications remain insulated from unnecessary and harmful economic regulation at both the federal and state levels."); *Statement of Chairman Kevin J. Martin, Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, First Report and Order and Further Notice of Proposed Rulemaking, FCC 05-153 (released Sept. 23, 2005) ("I believe that new technologies and services should operate free of economic regulations . . . .").

rational basis for the Commission to now reverse course and create brand new 254(g)-like requirements for broadband Internet access service.

Even if the Commission unwisely chose to disregard this long-standing policy of unregulation and attempted to create 254(g)-like regulations for broadband Internet access service, doing so would likely exceed the Commission's Title I authority. Viewed in the larger context of the other universal service provisions of section 254, section 254(g) has always been somewhat of a square peg forced into a round hole. In creating section 254 and directing the Commission to establish support mechanisms to preserve and advance universal service, Congress mandated that any such universal service support should be "explicit" (*i.e.*, direct monetary payments), as opposed to implicit (*i.e.*, subsidies built into rate structures).[44] In light of this mandate, the Commission has labored mightily over the last decade to remove implicit support from its universal service mechanisms and replace it with explicit support.[45] And whenever the Commission has strayed from that mission, the courts have been quick to remind it that "Congress unambiguously imposed an explicit subsidy requirement on federal support mechanisms,"[46] and "required that the implicit subsidy system of rate manipulation be replaced with explicit subsidies for universal service."[47]

Yet, quite oddly, section 254(g) is itself an *implicit* support mechanism for interexchange telecommunications services. By its terms, the rate averaging provision of section 254(g)

[44] 47 U.S.C. § 254(e).

[45] *See, e.g.*, *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (2000) (*CALLS Order*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244 (2001) (*MAG Order*).

[46] *Qwest v. FCC*, 398 F.3d 1222, 1232 (10th Cir. 2005).

[47] *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 318 (5th Cir. 2001).

requires interexchange carriers to offer the same rates to all of their customers, which means that the rates charged to subscribers in areas where the cost of providing interexchange telecommunications service is lower (e.g., urban areas) implicitly subsidize the rates charged to subscribers in areas where the cost of providing interexchange telecommunications service is higher (e.g., rural and insular areas). Similarly, the rate integration provision of section 254(g) requires providers of interstate interexchange telecommunications services to charge the same rates to customers regardless of what state they live in, which means that the rates charged to subscribers in low-cost states implicitly subsidize the rates charged to subscribers in high-cost states. Thus, section 254(g) stands as a unique and limited exception – applicable only to interexchange telecommunications services – to the general rule of section 254 that universal service support must be explicit.

Under these circumstances, it is unlikely that the Commission could exercise its Title I authority to create a new 254(g)-like implicit support mechanism for broadband Internet access service. While the Commission unquestionably has substantial authority under its general Title I jurisdiction over "interstate communications by wire or radio"[48] to craft regulations that are "reasonably ancillary to the effective performance of the Commission's various responsibilities,"[49] that authority is not entirely unlimited. When the Commission has attempted to use its Title I authority in a manner that conflicts with the substantive provisions of Act, the courts have stepped in to invalidate the Commission's actions.[50] Here, using Title I to *expand*

[48] 47 U.S.C. § 152(a).

[49] *U.S. v. Southwestern Cable*, 392 U.S. 157, 178 (1968). *See also* SBC Comments, WC Docket No. 04-36, 52-57 (May 28, 2004) (explaining the scope of the Commission's Title I authority).

[50] *See, e.g., FCC v. Midwest Video*, 440 U.S. 689 (1979) (invalidating Commission attempt to impose on cable companies under Title I the type of common carrier regulations the Act would prohibit if the regulated parties had been broadcasters).

the Act's rate averaging and rate integration requirements to include broadband Internet access service would directly conflict with the provisions of section 254(g) that limit those requirements to interexchange services. In addition, creating a 254(g)-like implicit support mechanism for broadband Internet access service would run headlong into 254(e)'s requirement that universal service support be explicit. Accordingly, a Commission decision to impose rate averaging or rate integration requirements on providers of broadband Internet access service under Title I is unlikely to survive judicial review.[51]

5. Network Outage Reporting

Pursuant to the Commission's network outage reporting rules, certain communications providers are required to report disruptions in their ability to provide service to their customers.[52] As a general matter, the network outage reporting requirements focus on the traditional circuit-switched voice and paging services offered by wireline, wireless, cable, and satellite providers, as well as SS7 providers whose signaling services support these voice and paging services.[53] In the *Consumer Broadband Notice*, the Commission asks whether it should exercise its Title I authority to impose similar requirements on providers of broadband Internet access service.[54]

At this point in time, AT&T does not believe that the Commission should extend its network outage reporting requirements to broadband Internet access service. While the Commission has historically required outage reporting for traditional voice and paging services, the Commission has justifiably refrained from applying such requirements to broadband Internet-

[51] *See Midwest Video*, 440 U.S. 689.

[52] 47 C.F.R. Part 4.

[53] *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, Report and Order and Further Notice of Proposed Rulemaking, FCC 04-188 (released Aug. 19, 2004) (*Network Outage Order*); 47 C.F.R. § 4.4.

[54] *Consumer Broadband Notice* ¶ 154.

based services. Indeed, when the Commission recently extended its voice and paging outage reporting requirements to wireless, cable and satellite providers, it repeatedly emphasized that it was *not* extending those requirements to "public data networks," which include broadband Internet access networks.[55] The Commission also expressly decided not to include VoIP services within its outage reporting requirements.[56]

The Commission's decision not to extend its outage reporting requirements to broadband and VoIP services is fully consistent with Congress's directive to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[57] In today's competitive broadband marketplace, providers already have strong incentives to maintain highly reliable, secure broadband networks as a basis to attract and retain customers. Rather than imposing burdensome reporting regulations on a well-functioning marketplace at this time, the Commission should encourage voluntary industry efforts through the National Reliability and Interoperability Council (NRIC), the Alliance for Telecommunications Industry Solutions (ATIS), and other similar organizations to closely monitor network reliability issues and, if necessary, to develop recommendations for furthering the security and reliability of broadband Internet access networks.

6. Section 214 Discontinuance Procedures

Under section 214 of the Act and the Commission's implementing rules, a telecommunications carrier seeking to discontinue service to customers must first notify its

[55] *Network Outage Order* ¶¶ 1 n.2, 10, 117.

[56] *Network Outage Order* ¶ 117.

[57] 47 U.S.C. § 230(b)(2).

customers of the impending discontinuance and must seek permission from the Commission to effectuate the discontinuance.[58] Pursuant to the Commission's discontinuance procedures, once the carrier has properly notified its customers and made the requisite filings with the Commission, the carrier will be automatically authorized to discontinue service within a set period of time (31 days for non-dominant carriers; 60 days for dominant carriers), unless the Commission finds cause not to permit the discontinuance and notifies the carrier that it is not automatically authorized to discontinue service.[59] However, because providers of broadband Internet access service are information service providers rather than telecommunications carriers, the Commission's discontinuance requirements do not apply to broadband providers. Accordingly, in the *Consumer Broadband Notice*, the Commission asks whether it should use its Title I authority to craft discontinuance requirements for broadband Internet access service.[60]

Although the broadband market is highly competitive and consumers can typically obtain service from an alternate provider if their existing provider discontinues service, it may nonetheless be prudent for the Commission to consider adopting some limited discontinuance procedures for broadband Internet access service providers. Unlike the situations discussed above with slamming, TIB and CPNI, where regulation is unnecessary because providers in a competitive market have strong incentives to adopt pro-consumer policies and practices, service providers that decide to discontinue service to their customers and exit the marketplace usually have few incentives to meet their customers' needs. Indeed, at this stage of a service provider's life cycle, the provider is typically more concerned with minimizing expenses and preserving its remaining assets than working cooperatively with other service providers to ensure a smooth

[58] 47 U.S.C. § 214(a); 47 C.F.R. § 63.71.

[59] 47 C.F.R. § 63.71(a), (c).

[60] *Consumer Broadband Notice* ¶ 155.

transition for its customers. In AT&T's experience, this lack of cooperation from the discontinuing provider can delay or disrupt the transition and can impose added costs on the new service provider.

In light of these concerns, the Commission may want to consider using its Title I authority to create a streamlined discontinuance procedure for broadband Internet access service – applicable to both facilities-based and non-facilities based providers – similar to the existing discontinuance procedure for non-dominant carriers.[61] In doing so, the Commission must be careful to balance its desire to protect consumers with its long-standing policy against regulating the Internet. Thus, any such broadband discontinuance procedure should be limited to the following elements: a brief customer notification requirement; a simplified filing process for the provider to seek discontinuance authority from the Commission; and a presumption that the discontinuance will be authorized within a set amount of time (*e.g.*, on the 31st day after the provider's application is filed), unless the Commission affirmatively acts to delay the discontinuance.[62]

This broadband discontinuance procedure should also be strictly limited to those instances where the provider intends to completely cut-off broadband Internet access service to its customers. Merely changing certain aspects of a customer's broadband Internet access service should *not* trigger the discontinuance requirements. Thus, increasing or decreasing the speed of broadband service, withdrawing or changing vertical features, eliminating a speed tier, changing the price or other terms of service, modifying the facilities used to provide the service, or any other alterations of the service should not be deemed a "discontinuance" in this context,

[61] *See* SBC Comments, WC Docket No. 04-36, at 126 (May 28, 2004) (advocating a limited discontinuance procedure for providers of IP-enabled services).

[62] *See*, *e.g.*, 47 C.F.R. § 63.71(c).

so long as the customer is still being offered the ability to receive broadband Internet access service.[63] In these cases, the provider is not exiting the market and, therefore, it will continue to have strong market-based incentives to adopt pro-consumer policies and practices; otherwise, it risks losing customers to its competitors.

7. Federal-State Partnership

In the *Consumer Broadband Notice*, the Commission acknowledges the important role that states have historically played in consumer protection matters.[64] The Commission then seeks comment on how it can best make use of the states' expertise in this area if it ultimately finds that some form of consumer protection regulations are warranted for broadband Internet access service.

As discussed above, the broadband Internet access marketplace is already highly competitive and there is generally no need for specific broadband-related consumer protection regulations in light of this competition. Moreover, as the Commission has definitively concluded, broadband Internet access services are inherently *interstate* services that fall within this Commission's exclusive jurisdiction.[65] Thus, to the extent the Commission finds it necessary to adopt consumer protection requirements for broadband Internet access service, those requirements must be established as part of a *federal* regulatory framework. In keeping with such a federal framework, any state involvement in the oversight of broadband Internet

[63] In addition, any such discontinuance procedures should not affect a provider's rights to discontinue service for non-payment.

[64] *Consumer Broadband Notice* ¶ 158.

[65] *See GTE Telephone Operating Companies*, CC Docket 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22,466 ¶¶ 1, 26 (1998); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 59 (2002).

access service must be conducted in a manner consistent with whatever national policies and rules this Commission adopts.

Nonetheless, the states can continue to play an important role in consumer protection matters in the broadband marketplace. As explained above, state attorneys general have an ongoing duty to enforce state unfair competition statutes to protect the interests of broadband consumers within their borders. At the same time, state public utility commissions should continue to actively participate in this Commission's ongoing efforts to monitor the health of the market for broadband services. For example, the Federal-State Joint Conference on Advanced Services "provide[s] a forum for an ongoing dialogue between this Commission, the states, and local and regional entities" in order to "facilitate the cooperative development of federal, state, and local mechanisms and policies to promote the widespread deployment of advanced services."[66] In furtherance of that mission, the Joint Conference has historically assisted the Commission in formulating broadband policy by conducting field hearings, preparing case studies, and submitting recommendations to the Commission for consideration in its broadband proceedings. As this Commission oversees the broadband Internet access marketplace going forward, it should continue to rely on the Joint Conference, as well as individual state commissions, for their valuable consumer protection insights and expertise.

III. CONCLUSION

Consistent with Congress's directives in the Act, AT&T urges the Commission to rely on market forces, rather than regulation, to ensure that consumers are being well-served in the

[66] *Federal-State Joint Conference on Advanced Telecommunications Services*, CC Docket No. 99-294, Order, FCC 99-293, at ¶ 3 (released Oct. 8, 1999).

competitive broadband marketplace. At the same time, however, AT&T encourages the Commission to continue monitoring the broadband marketplace and to swiftly take corrective action if consumer concerns arise in the future.

Respectfully Submitted,

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